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No. 81-1839

IN THE

Supreme Court of the United States

October Term 1981

MINNEAPOLIS STAR & TRIBUNE COMPANY,
Appellant,

v.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

Of Counsel:
NORTON L. ARMOUR
425 Portland Avenue
Minneapolis, MN 55488
FAEGRE & BENSON
1300 Northwestern Bank Building
Minneapolis, MN 55402

JOHN D. FRENCH
LAWRENCE C. BROWN*
JAMES B. LOKEN
JOHN P. BORGER
1300 Northwestern Bank Building
Minneapolis, MN 55402
Telephone: (612) 371-5300
Attorneys for Appellant
* Counsel of Record

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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The consistent approach of Appellee's Motion to Dismiss ("Motion") is to attempt to foreclose constitutional analysis by the use of phrases which assume the very conclusions which the State seeks. At base, the State's position is that it is free to ignore the discriminatory effect of successive tax classifications as long as each classification appears neutral on its face: *i.e.*, 1) sales tax exemptions for publications; 2) imposition of "compensating" use tax on paper and ink used by publications which are exempt from the sales tax; and 3) exclusion of the first $100,000 of paper and ink per publication; with the result that only large Minnesota publishers

are subject to a substantial tax burden which smaller and foreign publishers escape entirely.

Contrary to this Court's recent reminder that "regulation of First Amendment rights is *always* subject to exacting judicial review," *Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071, 4072 (1981) (emphasis added), the State contends that the challenged use tax should not be subject to strict scrutiny because it is "a part of Minnesota's general system of nondiscriminatory sales and use taxation." (Motion at 16.)[1] The State might argue with as much logic that statutes forbidding publication of the names of rape victims disclosed in public records or of juvenile offenders are exempt from judicial review as "part of a general criminal code" or that libel laws are similarly immune from constitutional analysis as "part of the State's general system of tort law." This Court has consistently shown itself to be more sensitive to constitutional questions. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (names of rape victims); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (names of juvenile offenders); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel).[2]

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[1] In arguing against a strict scrutiny standard in this case, the State correctly notes (Motion at 18) that the Vermont Supreme Court applied a less rigorous standard in upholding a use tax on ink, newsprint and other supplies used in the publication of free newspapers. *Hadwen, Inc. v. Vermont Dept. of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed* 451 U.S. 977 (1981). However, judging from the Jurisdictional Statement submitted to the Court by Hadwen, Inc., it appears that the publisher in that case itself proposed the "rational basis" standard of review and never invoked strict or exacting scrutiny. Such litigation strategy may bind Hadwen as the law of the case, but it hardly constitutes precedent applicable in the present appeal.

[2] Although the State seeks to use labels to avoid judicial review of the challenged use tax, it implies that Star Tribune is less than serious about its constitutional objections to the tax because of the timing of the commencement of this action and of the filing of the summary judgment motion. (*Cf.* Motion at 5, 6.) Nothing could be farther from the truth. Ever since the 1971 enactment of the

The State seeks to justify the challenged use tax by describing it as "an integral part of Minnesota's general sales and use tax law" (Motion at 7) and by distinguishing the "narrowly drawn aspects" of the Louisiana tax at issue in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (Motion at 9). At the same time, it defends the peculiarities of the challenged tax by asserting: "The Minnesota legislature is not constitutionally constrained to exempt all items of property from taxation, or none at all." (Motion at 22.) If the State's broad position is accepted, it would be free to "fine tune" its taxes without restriction and without regard for any adverse impact of the taxes on constitutional rights.

Sales and use taxes are particularly susceptible to discriminatory adjustment. General revenue-raising measures such as income taxes, property taxes, and gasoline taxes can legitimately be refined through classifications and exemptions, but such taxes cannot legitimately be directed specifically against a particular class of users, such as publishers, because the discrimination becomes so blatant that the classification requires dismissal out of hand when it affects constitutional interests. At oral argument before the Minnesota Supreme Court, Justice Peterson posited a gasoline excise tax "made applicable only to publication companies that used in excess of a certain number of gallons of gasoline." (A-30.) The State's counsel conceded, in effect, that such a tax would be patently unconstitutional. (*Id.*) ("Well, in that case, Your Honor, there would be no question that—you know, that would be aimed precisely at, you know, the publication in-

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tax, Star Tribune has raised the constitutional arguments and has sought relief from other branches of government. In fact, Governors Wendell Anderson, Rudolph G. Perpich and Albert H. Quie have supported and encouraged efforts to repeal the challenged use tax. Bills to repeal the tax were introduced in each legislative session.

dustry, and one of our positions in this case is that this tax is not aimed precisely at the publication industry.") Unlike income, property and gasoline taxes, which are broad taxes, sales and use taxes by their very nature classify and exempt according to particular uses; it is difficult to conceive of a sales and use tax classification expressly directed at newspapers which the State would not attempt to justify, under the Minnesota Supreme Court's rationale, as "part of a general system of sales and use taxation." There then apparently would be no limit to the State's power to tax newspapers.

Indeed, the "fine tuning" of the $100,000 exemption allows the State to change the effective rate of use tax paid by publications (*see* Jurisdictional Statement at 16-17 and A-90-92), notwithstanding its present assertion that it could not change the rate of the challenged tax without also changing the tax rate on all other businesses and persons subject to Minnesota sales and use taxes (Motion at 7 n.4). Far from being a "smoke screen" (Motion at 24), Star Tribune's challenge to the $100,000 exemption emphasizes the potential for abuse which can be achieved through discriminatory adjustment of the sales and use taxes. Other abuses are readily conceived:

> Could the per-publication exemption be increased to the point that only one publisher, rather than a dozen publishers, paid any tax at all?
>
> Instead of exempting sales of publications published quarterly or more frequently, could the State choose to exempt only publications published four times per week or less frequently (just as is now done through the $100,000 exemption in the use tax)?
>
> Could it tax only newspapers in cities with large populations, as the State implies (Motion at 26)?

Could it, despite *Grosjean*, explicitly tax sales only of publications with circulations above a certain level, on the grounds of defraying the "social costs" of large businesses or of giving favorable tax treatment to small enterprises (*cf.* Motion at 26)?

Could the State tax the sale of publications and all other tangible personal property, and then grant successive exemptions until eventually only publications were subject to the "general" sales tax?

And, in the context of this Court's deliberations on noting probable jurisdiction of the present appeal, could the State create such classifications without any concern for scrutiny by this or any other Court?

The answer to each question is, and must be, negative, but the State takes a contrary position.

It does not matter whether a truly nondiscriminatory general sales tax which included a tax on newspapers could pass constitutional muster. Minnesota has never enacted such a sales tax. What Minnesota has done is to impose a use tax on paper and ink, rather than a sales tax on publications, and, by creating a $100,000 per-publication exemption, thereby discriminate between publishers and other industrial users of paper and ink, between foreign and domestic publishers, and between large and small publishers. There are no such substantial discriminations to be found in any of the post-*Grosjean* decisions affirming taxes affecting the press. Minnesota's distorted substitute for legitimate sales and use taxation should, and must, be repudiated by this Court.

Star Tribune respectfully requests this Court to reverse summarily the decision below, or, alternatively, to note probable jurisdiction and to set the case for full briefing and argument on the merits.

Respectfully submitted,

JOHN D. FRENCH
LAWRENCE C. BROWN*
JAMES B. LOKEN
JOHN P. BORGER
1300 Northwestern Bank Bldg.
Minneapolis, MN 55402
Telephone: (612) 371-5300
Attorneys for Appellant
* Counsel of Record

Of Counsel:
NORTON L. ARMOUR
425 Portland Avenue
Minneapolis, MN 55488
FAEGRE & BENSON
1300 Northwestern Bank Bldg.
Minneapolis, MN 55402